No. 83-56

In the Supreme Court of the United States

October Term, 1983

MARGARET M. HECKLER,
Secretary of Health and Human Services,

Petitioner,

v.

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual and SHIRLEY SORGER, an individual,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether the Secretary of Health and Human Services may be estopped when her agent repeatedly and knowingly violates his statutory duty to communicate questions raised by a provider for which the Secretary has provided no guidance to the proper authority within the Department of Health and Human Services choosing instead to communicate his own policy decision upon which the provider relies to its detriment?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the Travelers Insurance Companies was an appellee in the court of appeals.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's decision in this case. That decision is recorded at 698 F.2d 615 and Appendix A, pages 1a-33a of the petition.

STATUTE, REGULATION AND CONTRACT INVOLVED

At times relevant to this dispute, § 1816(a) of the Social Security Act, 42 U.S.C. § 1395h(a), provided:

> If any group or association of providers of services wishes to have payments under this part to such providers made through a national, State, or other public or private agency or organization and nominates such agency or organization for this purpose, the Secretary is authorized to enter into an agreement with such agency or organization providing for the determination by such agency or organization (subject to the provisions of § 1395(oo) of this title and to such review by the Secretary as may be provided for by the agreement) of the amount of the payments required pursuant to this part to be made to such providers, and for the making of such payments by such agency or organization to such providers. Such agreement may also include provision for the agency or organization to do all or any part of the following:
>
> > (1) to provide consultative services to institutions or agencies to enable them to establish and maintain fiscal records necessary for purposes of this part and otherwise to qualify as hospitals, extended care facilities, or home health agencies, and
> >
> > (2) with respect to the providers of services which are to receive payments through it
> >
> > > (a) to serve as a center for, and communicate to providers, any information or instructions furnished to it by the Secretary, and serve as a channel of communication from providers to the Secretary;
> > >
> > > (b) to make such audits of the records of providers as may be necessary to ensure that proper payments are made under this part; and

(c) to perform such other functions as are necessary to carry out this subsection.

Section 1817 of the Social Security Act, 42 U.S.C. § 1395i, provides in pertinent part for the establishment of a Trust Fund:

(a) There is hereby created on the books of the Treasury of the United States a trust fund to be known as the "Federal Hospital Insurance Trust Fund" (hereinafter in this section referred to as the "Trust Fund"). The Trust Fund shall consist of such gifts and bequests as may be made as provided in § 401(i)(1) of this title, and such amounts as may be deposited in, or appropriated to, such fund as provided in this part. There are hereby appropriated to the Trust Fund for the fiscal year ending June 30, 1966, and for each fiscal thereafter, of any monies in the Treasury not otherwise appropriated, amounts equivalent to 100% of

(1) the taxes imposed by §§ 3101(b) and 3111(b) of Title 26 with respect to wages reported to the Secretary of the Treasury or his delegate pursuant to subtitle F of such Title 26 after December 31, 1965, as determined by the Secretary of the Treasury by applying the applicable rates of tax under such sections to such wages, which wages shall be certified by the Secretary of Health, Education and Welfare on the basis of records of wages established and maintained by the Secretary of Health, Education and Welfare in accordance with such reports; and

(2) the taxes imposed by § 1401(b) of Title 26 with respect to self-employment income reported to the Secretary of the Treasury or his delegate on tax returns under Subtitle F of such Title 26, as determined by the Secretary of the Treasury by applying the applicable rate of tax under such section to such

> self-employment income, which self-employment income shall be certified by the Secretary of Health, Education and Welfare on the basis of records of self-employment established and maintained by the Secretary of Health, Education and Welfare in accordance with such returns.

The amounts appropriated by the preceding sentence shall be transferred from time to time from the general fund in the Treasury to the Trust Fund, such amounts to be determined on the basis of estimates by the Secretary of the Treasury of the taxes, specified in the preceding sentence, paid to or deposited into the Treasury; and proper adjustments shall be made in amounts subsequently transferred to the extent prior estimates were in excess of or were less than the taxes specified in such sentence.

* * *

> (h) The Managing Trustee shall also pay from time to time from the Trust Fund such amounts as the Secretary of Health, Education and Welfare certifies are necessary to make the payments provided for by this part, and the payments with respect to administrative expenses in accordance with § 401(g)(1) of this Title.

42 C.F.R. 405.1803 provides in part:

> (a) Upon receipt of a provider's cost report, or amended cost report where permitted or required, the Intermediary shall, within a reasonable period of time (see § 405.1835(b)), analyze the report, undertake any necessary audit of the report, and furnish the provider and other parties appropriate (see § 405.1805) a written notice reflecting the Intermediary's determination of the amount of program reimbursement. The notice shall:
>
> > (1) explain the Intermediary's determination of total program reimbursement due the provider for

the reporting period covered by the cost report or amended cost report;

(2) relate this determination to the provider's claimed total program reimbursement due the provider for this period;

(3) explain the amount(s) and the reason(s) why, by appropriate reference to law, regulations, or program policy and procedures this determination may differ from the provider's claim; and

(4) inform the provider of its right to an Intermediary or Board Hearing, as appropriate (see §§ 405.1809, 405.1811, 405.1815 and 405.1835-405.1843) and that such Hearing must be requested within 180 days after the date of the notice.

The contract between the Secretary and the Intermediary (Travelers), referenced in § 1816 of the Social Security Act, 42 U.S.C. § 1395h(a), provides in pertinent part:

ARTICLE II

FUNCTIONS AND DUTIES TO BE PERFORMED BY INTERMEDIARY

The Intermediary shall:

A. Make determinations as to the coverage of services, of the amounts of payments and make payments to providers of services and eligible individuals in accordance with provisions of the Act, Regulations, and General Instructions.

B. Receive, disburse, and account for funds in making such payments.

C. Make audits of the records of providers of services as provided in Article IX.

D. Assist providers of services in the development of procedures relating to utilization practices and make studies of the effectiveness of such procedures, including the

appraisal and evaluation of the results of provider utilization review activity and recommendations for necessary changes in provider utilization practices and procedures; and assist in the application of safeguards against unnecessary utilization services.

E. Serve as a center for, and communicate to providers of services, any information or instructions furnished to it by the Secretary and serve as a channel of communication from providers of services to the Secretary.

F. Assist any institution, facility or agency to qualify as a provider of services and to furnish consultative services to such provider to enable it to establish and maintain fiscal records for purposes of Title XVIII of the Act. Consultative services by the Intermediary or any parent, affiliated or subsidiary organization, for providers of services, shall not include, (1) the preparation or completion of preliminary or initial cost reports, or (2) a compilation and maintenance of statistical or financial data and records.

G. As the Secretary may approve a request, make such Medicare management studies as may be necessary to insure the effective performance of this agreement.

H. Participate in or perform statistical and research studies as the Secretary may request or approve.

I. Establish and maintain such procedures as the Secretary may approve for considering and resolving any differences which may result when disputes arise from provider dissatisfaction with determinations of provider cost reports.

J. Establish and maintain such procedures as the Secretary may approve for the review and reconsideration of determinations under which payment to an eligible individual or provider of services on behalf of an individual for services furnished him has been denied or the amount of such payment is in controversy.

K. Upon inquiry, assist individuals with respect to matters pertaining to this agreement.

L. Perform such duties as may be necessary to carry out the provisions of this agreement and such other duties as may be agreed upon by the Secretary and the Intermediary.

* * *

ARTICLE XI

INDEMNIFICATION

In the event the Intermediary or any of its directors, officers or employees, or other persons who are engaged or retained by the Intermediary to participate directly in the claims administration process are made parties to any judicial or administrative proceeding arising, in whole or in part, out of any function or duty of the Intermediary under this agreement in connection with any claim for benefits by any individual, or his assignee, or provider of services, then the Secretary shall hold the Intermediary harmless for all judgments, settlements, and costs, in favor of such individual, or his assignee, or providers of services, incurred by the Intermediary or any of its directors, officers or employees, or other persons engaged or retained by the Intermediary to participate directly in the claims administration process, in connection therewith. The Intermediary shall reimburse the United States for the amount of any valid judgment or award paid by the United States in the discharge of the Secretary's obligations under this Article if the liability underlying the judgment or award was the direct consequence of conduct on the part of the Intermediary, determined by judicial proceedings or the agency making the award to be criminal in nature, fraudulent or grossly negligent.

STATEMENT OF THE CASE

A. Procedural Background

Respondents commenced this action to prevent petitioner through her agent, Intermediary Travelers Insurance Companies ("Travelers"), from withholding future Medicare reimbursement payments owed to respondent Community Health Services of Crawford County, Inc. ("CHS"), a non-profit home health care agency, because Travelers alleged that CHS had been overpaid for Medicare services rendered during its cost years 1975, 1976 and 1977. Prior to bringing this action, CHS requested that petitioner waive any recoupment of the alleged overpayments because CHS was without fault and, when that was denied, CHS requested an administrative hearing before the Provider Reimbursement Review Board ("PRRB"). Because of the continuing threat to withhold funds, respondents sought a Temporary Restraining Order which was granted by the District Court. Thereafter, agreement was reached with petitioner to hold in abeyance any recoupment activity pending final resolution of the dispute. A stipulation for a stay in the District Court action was entered to permit CHS to proceed with its hearing before the PRRB.

The hearing before the PRRB was limited because of the jurisdiction of the PRRB. See 42 C.F.R. § 405.1873 and 42 C.F.R. § 405.1869. The Board had no authority to consider the estoppel question. That issue along with several other issues not within the PRRB's jurisdiction and therefore not considered by the PRRB was preserved and raised *de novo* in CHS's appeal to the United States District Court for the Western District of Pennsylvania.

In the District Court, petitioner and CHS filed cross motions for summary judgment. The District Court denied CHS's motion and granted petitioner's. See District Court decision, Appendix C, pages 36a-48a of petition.

Respondents appealed from the District Court decision raising the following questions:

1. Whether the District Court erred in finding that the United States is not estopped from recouping alleged overpayments to Community Health Services of Crawford County, Inc. ("CHS"), a provider of services under the Medicare Act, where CHS, after inquiry made to Travelers Insurance Companies ("Travelers") as Intermediary for the United States, was repeatedly advised over a period of years that certain costs need not be offset by Comprehensive Employment and Training Act ("CETA") income in calculating cost reimbursement payments and CHS relied upon that advice, incurred the costs and expended income to expand non-profit medical services to the community?

2. Whether the District Court erred in finding that Travelers, as Intermediary for the United States, did not act outside the scope of its authority in advising CHS and inducing CHS' reliance and, therefore, never decided whether Travelers should be held liable to CHS and or the United States for payments to CHS which Travelers approved?

3. Whether the District Court erred in finding that there never was an official "policy" with respect to the cost accounting treatment of CETA grants so that there could not have been a policy change and therefore no violation of the Administrative Procedure Act?

4. Whether the District Court erred by finding that the PRRB did not abuse its discretion when it prevented CHS from introducing evidence that the United States, through Travelers, applied its policy of requiring CETA grants to be offset in a discriminating manner thereby denying CHS equal protection under the law?

5. Whether the decision by the Provider Reimbursement Review Board ("PRRB") and the affirmation of that decision by the District Court unfairly shift the cost of

delivery services to individuals not so covered in violation of the Medicare Act?

6. Whether, after deciding waiver was permitted, the District Court erred in concluding that the Secretary did not abuse his discretion in deciding not to waive recovery even though the Secretary has claimed throughout this action that he lacked authority to waive recovery?

7. Whether the District Court erred in concluding that the Provider Reimbursement Review Board ("PRRB") did not error in holding that CETA grants did not qualify as seed money grants?

8. Whether the District Court deprived the individual plaintiffs in Civil Action No. 78-74B of their property, interest and right to services under Medicare without the opportunity to be heard and the due process of law by applying the December 29, 1980 Memorandum Opinion and Order to Civil Action No. 78-74B?

Brief for Appellants in the United States Court of Appeals for the Third Circuit No. 82-5098.

The Third Circuit analyzed the factual information presented to it and concluded:

> We hold that the District Court erred in concluding that equitable estoppel does not lie against the Secretary of Health and Human Services on the facts of this case. We therefore will reverse the judgment of the District Court which granted appellee's motion for a summary judgment and remand these proceedings to the District Court with the direction that it grant appellants' petition to estop the Secretary from recouping the alleged overpayment.

698 F.2d at 628; Appendix A, page 23a of petition.

Because of its decision on the estoppel issue, the Third Circuit did not reach any of the other issues presented by respondents in their appeal. Petitioner filed a petition with the

Third Circuit for a rehearing, but that petition was denied. See Appendix B, pp. 34a-35a of petition. Thus, the only issue subject to this Court's consideration is the estoppel issue.

Subsequent to the issuance of the mandate by the Third Circuit, CHS applied for and was awarded attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), for those costs and fees not previously reimbursed under the Medicare cost accounting procedures and court procedures for taxing costs. See Order and Opinion dated June 7, 1983, Appendix A hereto, pages 1a through 4a. Petitioner filed her Notice of Appeal to the June 7, 1983 order on August 3, 1983.

B. Facts Material To The Consideration Of The Question Presented

The transactions between CHS and Travelers which gave rise to this controversy are not in dispute. Travelers' Medicare manager, Michael Reeves, and CHS's administrator, John Wallach, both testified at the PRRB Hearing and there was no disagreement between them as to what occurred. CHS's Wallach testified that he asked Reeves on at least five occasions how CHS was supposed to treat the CETA grants for cost accounting purposes. Travelers' Reeves advised Wallach that the CETA grants did not have to be offset against CHS's reimbursable costs because they qualified as "seed money." Travelers then approved CHS's cost reports which CHS prepared as directed by Reeves. The Secretary's regulations required Travelers to provide CHS with written notice reflecting Travelers' determination of the amount of program reimbursement and Reeves testified that that was done. 42 C.F.R. § 405.1803. Thus, Travelers was obligated to provide written advice to CHS for the Cost Years in question and, pursuant to those procedures, approved CHS' cost reports prepared according to the "Reeves" procedure.

Travelers first advised CHS in October 1977, the last month of CHS's 1977 Cost Year, that there was a problem with

the cost accounting procedure directed by Reeves. This was approximately two and one-half years after Wallach's first inquiry and Reeves' first guidance and after CHS had used the "extra" funds to expand the services that it provided to the residents of Crawford County. The "extra" funds were used as start-up funds for various governmental approved programs until the programs became self-sustaining through the Medicare cost reimbursement procedures. The CETA grant funds were the only means for CHS, a non-profit agency, to accomplish this expansion. These services that CHS provided by using the CETA grants were especially critical because the Secretary had designated the geographical area served by CHS as medically underserved under Section 332 of the Public Health Service Act. 42 U.S.C. § 254e. Section 332 provides generally for increased government assistance in terms of money and or Public Health Service employees to ease the medical shortages.

The Secretary does not dispute that these "extra" funds were used to benefit the citizens of Crawford County. This is further acknowledged by the Third Circuit.

> The Court wishes to emphasize the injustice to CHS and the people it serves if it is required to refund the alleged overpayments. The extra monies were used to expand CHS' services to meet serious human needs. This case, therefore, is distinguishable from others that involve possible overtones of fraud or profiteering by submitting to Medicare inflated cost reports for unnecessary services. No one questions the reasonableness of the amounts paid to, or the necessity of employing CETA workers. The only people who profited were the weak, the lame and the ill who comprised CHS' impoverished and medically underserved beneficiaries. They would be the persons injured if CHS were required to repay the funds in question. In granting CHS' motion for a Temporary Restraining Order, the District Court recognized this harm when it asserted that recoupment of the CETA funds "will likely

> cause CHS to cease or severely curtail operations as a home health service agency, thereby threatening the health and lives of the individual plaintiffs and others similarly situated." This Court, like the Second Circuit, refuses to sanction such a manifest injustice occasioned by the Government's own misconduct.

698 F.2d at 627; Appendix A, p. 21a of petition.

Reeves testified at the PRRB Hearing that he knew of no official policy concerning the CETA grants at the time he was asked by CHS for guidance. Even in hindsight, Reeves was unable to identify any policy during this time period. There is no other testimony concerning petitioner's alleged policy. Reeves further testified that the procedure, which Intermediaries were to follow to obtain answers to questions for which there was no guidance, was to pass the questions along to the regional office of the Bureau of Health (an agency of the Secretary). Reeves did not pass along CHS' repeated inquiries for over two years yet advised CHS during this time not to offset the CETA grants.

After hearing and analyzing the testimony, the PRRB made factual findings as follows:

> [T]he Board would like to acknowledge the Provider's [CHS] argument concerning the role of the fiscal Intermediary [Travelers]. The Regulations succinctly state that "an important role of the fiscal Intermediary, in addition to claims processing and payment and other assigned responsibilities, is to furnish consultative services to providers in the development of accounting and cost-finding procedures which will assure equitable payment under the program" [42 C.F.R. 405.401(e)]. However, it should be emphasized that the role of the Intermediary is not to establish the principles of reimbursement. This is the responsibility of the Secretary. Although the Provider acted in good faith in not offsetting salaries and fringe benefits by CETA funds, advice by the Intermediary cannot be a substitute for the Opinion of the Secretary.

Petition, p. 54a.

Finally, recoupment of the alleged overpayments would likely cause CHS to close its doors. The District Court recognized this possibility early in the case when it issued a Temporary Restraining Order, a portion of which is cited by the Third Circuit at 698 F.2d at 626; Appendix A, page 19a of the petition. The reason for this problem is that the Secretary's regulations do not appear to distinguish between not-for-profit agencies and for-profit agencies when recoupment is indicated. Not-for-profit agencies are prohibited from generating income out of which recoupment could occur. Cash flow is critical to CHS' existence.

SUMMARY OF THE ARGUMENT

The facts underlying the proceedings are not in dispute. Petitioner merely disagrees with the Third Circuit's application of the law to the facts and offers no speical and important reasons for this Court's review. CETA has been repealed and petitioner makes no effort to show the prospective value of any decision which would be rendered by this Court. Factually, CHS inquired and was advised on at least five occasions over a period in excess of two years not to offset CETA funds against its costs. Relying on petitioner's agent, CHS used the "extra" funds to start-up new programs which subsequently became self-sustaining under the Medicare program. Only innocent people will be hurt if the Third Circuit is reversed.

ARGUMENT: REASONS FOR DENYING THE PETITION

A. The Facts Are Peculiar To This Case And Do Not Present This Court With The Opportunity To Settle Principles Of Importance To The Public.

Rule 17 of the Supreme Court Rules states that review "will be granted only when there are special and important

reasons therefor." This is the cornerstone of a petition for certiorari in a federal case. The Secretary's petition does not demonstrate reasons that are either special or important.

Petitioner's attempt to obtain this Court's review on writ of certiorari focuses on one principal argument: that the factual circumstances of this case do not justify the Third Circuit's decision estopping petitioner from recouping the alleged overpayments. This issue will be addressed in Section B.

Petitioner's focus on the factual circumstances is an apparent attempt to divert attention from her inability to justify the petition under Rule 17 of the Supreme Court Rules. Petitioner merely states that the estoppel issue is important but fails to support that statement with other than a conclusionary, general argument.

In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), the court reasoned:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.

349 U.S. at 79 (quoting from *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923)). Petitioner makes no such showing.

In the Eighteenth Annual Benjamin N. Cardoza Lecture delivered before the Association of the Bar of the City of New York on October 28, 1958, Justice Harlan identifies three basic propositions to be considered by the Court when reviewing petitions for writ of certiorari in a federal case. First, Justice Harlan identifies the cornerstone as a "showing that the question sought to be reviewed is one of *general* importance." (Emphasis in the original.) Harlan, *Manning the Dikes*, 13

Record N.Y.C.B.A. 541, 551 (1958). An issue deemed important for review implies that the matter is of public interest and not merely a case of importance to the litigants.

The second basic proposition identified by Justice Harlan for a federal case requires a conflict of decisions between courts of appeal. Even here, Justice Harlan cautions that "differences between the courts of appeals in two or more circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved." Harlan, *supra* at 552.

The third and final proposition sets forth a special and important reason test for non-conflict cases. Under non-conflict circumstances, the decision on whether to accept the petition should be a flexible one in order to accommodate changing circumstances. The focus of the review should be "the effect of the decision upon the 'exposition and enforcement' of the law, rather than its impact upon the parties in a particular case, that lies at the heart of the matter." Harlan, *supra* at 553. Examples of cases which are within the arguable class for certiorari may be those which involve a substantial constitutional point, the construction of an important federal statute, cases which have been decided contrary to decisions of this Court or important questions of public law.

The Secretary's petition identifies no conflict between the circuit decisions nor can the Secretary argue that the Third Circuit's finding of affirmative misconduct is contrary to any decision of this Court. In fact, the Secretary identifies two decisions where this Court refused to determine whether the government could be estopped in a case involving affirmative misconduct. See footnote 6 of the petition at page 12; *INS v. Miranda*, ___ U.S. ___, 74 L.Ed.2d 12 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981). Other circuits have held that the government can be estopped. See, e.g., *Mendoza-Hernandez v. INS*, 664 F.2d 635 (7th Cir. 1981); *Corniel-Rodriquez v. INS*,

532 F.2d 301 (2d Cir. 1976); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970); *Walsonavich v. United States*, 335 F.2d 96 (3d Cir. 1964).

Petitioner's sole attempt to bring this case within the debatable class for certiorari is her very general argument that this decision will have an adverse impact on federal funding programs in general where funds are paid out prior to any detailed audit. The argument appears to be that this case as it now stands will somehow prevent the federal government from recovering overpayments or would require the expenditure of substantial federal funds to do so. Petitioner fails, however, to identify any federal programs other than those created by the Social Security Act or to identify the impact. The only other argument raised by petitioner is that the Third Circuit's decision permits a court authorized raid on the public treasury. This is certainly not the case as the money to support the Medicare program is paid by a Trust Fund which receives its funding from employee and employer contributions and is subject to statutory trust arrangements. See Section 1817 of the Social Security Act, 42 U.S.C. § 1395i.

This case is simply one where the factual occurrences were so egregious that the Third Circuit found that an innocent third party, CHS, should not be held accountable for Travelers' errors. Moreover, the statutory provision which gives petitioner the authority to contract services with an intermediary such as Travelers, 42 U.S.C. § 1395h(a), and the contract between petitioner and Travelers, pertinent parts of which are set forth in the statutes section herein, permit petitioner to seek reimbursement from Travelers under circumstances such as those involved in this case. Petitioner has apparently made no effort to seek reimbursement from Travelers. In fact, petitioner now appears to be caught in a conflict of interest because of her legal representation of Travelers throughout this litigation. Query, how can petitioner now take an adversarial position with Travelers and attempt to obtain payment from Travelers for its actions?

Finally, petitioner has made no showing that circumstances such as those involved in this case could or would occur in the future. This is particularly important because the Comprehensive Employment and Training Act ("CETA") was repealed by Public Law 97-300, Title I, § 184(a)(1), October 13, 1982, 96 Stat. 1357, 29 U.S.C.A. § 801 et seq. (Supp. Vol.). Thus, any decision which could occur in this case would have no value as a precedent, only by analogy.

This is not a case where the Court should exercise its discretion and grant the writ of certiorari because the facts are peculiar to this case and petitioner simply disagrees with the result.

B. The Finding Of Affirmative Misconduct Was Reasonable And, As A Result, The Petitioner Should Be Estopped

If, under some circumstances, the government can be estopped, then this case merely turns on factual issues and would provide no general guidance to subordinate courts at all.

1. The Government Can Be Estopped

Underlying all of the recent government estoppel cases decided by this Court is the concept that affirmative misconduct by the government may be sufficient to invoke the doctrine of equitable estoppel against the government.[1] These decisions imply that, presented with the proper case, this Court would find affirmative misconduct sufficient to estop the government. For example, in *INS v. Miranda, supra*, this Court approved the Court of Appeals' procedure:

> The Court of Appeals thus correctly considered whether, as an initial matter, there was a showing of affirmative misconduct.

[1] Recent cases are *INS v. Miranda*, ___ U.S. ___, 74 L.Ed.2d 12 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *INS v. Hibi*, 414 U.S. 5 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961).

— U.S. —, 74 L.Ed.2d at 16. Even petitioner concedes that affirmative misconduct may be grounds for estopping the government. Petition at page 11.

Significantly, if affirmative misconduct is sufficient to estop the government, this case turns on purely factual considerations which would distinguish it from other cases. This is evident from the Third Circuit's opinion wherein that court factually distinguished the four recent cases and, additionally, distinguished *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). The analysis by the Third Circuit is clear and will not be repeated herein.

A further distinguishing feature between this case and *Schweiker v. Hansen, supra*, is that CHS is not attempting to recover a social security benefit for which there is no longer eligibility. In this case it is the government that is attempting to recover an alleged overpayment but which, if recovered, would probably cause CHS to close its doors thereby depriving the individual respondents of property rights which they have accrued because of their payment into the Trust Fund. This deprivation is evident in the record because of petitioner's declaration that the geographical area served by CHS is medically underserved. Thus, it is likely that the individual respondents would be unable to obtain medical treatment under the Medicare Act. See Court of Appeals Appendix, pages 35a-68a. If CHS closed its doors, petitioner would then be obligated to provide medical personnnel and facilities to replace those provided by CHS. See Section 332 of the Public Health Service Act, 42 U.S.C. § 254e. Depletion of the public fisc by petitioner, not CHS, would then occur.

Finally, this case is not analogous to *Schweiker v. Hansen, supra*, because it is not a question of eligiblity. CHS was permitted under any construction of the law and regulations to use as a cost the salary and benefits provided to its employees whether they were regular or CETA employees. They were all

on the CHS payroll. The only procedure which petitioner can contend that CHS did not follow is that CHS did not offset the CETA money received against its costs. There is no substantive ineligibility to claim these costs. Only an accounting procedure is involved. Reeves testified that there was no guidance on the procedure and that in response to CHS' question he told CHS not to offset. To hold CHS responsible would be a travesty of justice.

2. There Was Affirmative Misconduct

Petitioner insists that she must comply with recoupment requirements of the statute and the regulations promulgated in support thereof, but where is petitioner's insistence that her agent, Travelers, must also comply with the statute and its contractual obligations to petitioner and to CHS as a third party beneficiary of that contract? Pursuant to § 1816(a) of the Social Security Act, 42 U.S.C. § 1395h(a), petitioner was authorized to enter into an agreement with an agent such as Travelers to provide payments to providers such as CHS. Additionally, petitioner was authorized to include provisions which would require Travelers to serve as a channel of communication from providers to petitioner.

Petitioner entered into such an agreement with Travelers. The agreement *required*, not permitted, Travelers to serve as a channel of communication. See the contract clause quoted in the statute section hereof. The testimony of Reeves reveals that he knew of the statutory contractual requirement to serve as a channel of communications but did not communicate CHS' question concerning cost accounting procedures until August of 1977, a period in excess of two years from CHS' first inquiry. The circumstances are clearly distinguishable from *Schweiker v. Hansen*, *supra*, because Reeves did not fulfill the duty to serve as a channel of communications contrary to law and to Travelers' contract with petitioner. CHS reasonably, and in good faith, relied on Reeves' advice. Subsequently, when the

procedure was changed (or created), CHS filed its lawsuit to prevent bankruptcy. Reeves knew what he was supposed to do, failed to do it, and then compounded the problem by giving the same advice to CHS for some two and a half years, advice that petitioner now contends was wrong. Clearly, Reeves' knowing violation of statutory and contractual provisions is affirmative misconduct. Petitioner should be estopped.

Throughout her petition, petitioner is rehashing the question of whether CETA grants qualify as seed money or not. CHS contends that this portion of petitioner's brief is not responsive because that question was not reached by the Third Circuit. The Third Circuit only decided the estoppel question.

Petitioner contends that the statute and the regulations require her to reopen any cost report found to be incorrect and that CHS was at least constructively aware of these requirements and thus CHS' reliance was not reasonable. The difficulty with this position is that petitioner must presuppose her lack of notice of the circumstances which caused the adjustment or, the question becomes why did the Secretary or her agent persist in giving erroneous advice. Such is not the case here. There is no dispute about CHS' notification of petitioner's agent prior to doing anything with its cost reports. The petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation, ADA WERNER, an individual, FRANK E. WERNER, an individual, and SHIRLEY SORGER, an individual vs. JOSEPH A. CALIFANO, JR., Secretary of the Department of Health, Education and Welfare, and THE TRAVELERS INSURANCE COMPANIES, a corporation	Civil Action No. 78-74 ERIE
COMMUNITY HEALTH SERVICES OF CRAWFORD COUNTY, INC., a non-profit corporation vs. PATRICIA ROBERTS HARRIS, Secretary of the Department of Health, Education and Welfare, and THE TRAVELERS INSURANCE COMPANIES, a corporation	Civil Action No. 80-56 ERIE

ORDER

AND NOW, this 7th day of June, 1983, the motion of the plaintiffs for attorneys' fees and expenses is GRANTED and plaintiffs are hereby AWARDED reasonable attorneys' fees and expenses in the sum of $17,920.53.

/s/ GERALD J. WEBER

Gerald J. Weber
United States District Judge

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J. ALAN JOHNSON, United States Attorney
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OPINION

WEBER, D.J. June 7, 1983

The plaintiffs, who prevailed in this action before the Court of Appeals, seek attorneys' fees and expenses under the Equal Access to Justice Act. The government does not contest that plaintiffs were the prevailing parties, nor contest the reasonableness of the fees and expenses requested. Its sole base of

opposition is that its position was substantially justified within the terms of the statute. We believe that the burden of proving substantial justification rests on the government.

The government argues that substantial justification is founded on the fact that it prevailed before the Provider Reimbursement Reveiw Board and that it also prevailed before the District Court, and that one of the three members of the panel on the Court of Appeals dissented from the finding of the Court. It argues that the question of its being substantially justified is a question of reasonableness, and this "should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case." *Board Avenue Laundry and Tailoring v. United States*, 639 F.2d 1387, 1391 (Fed. Cir. 1982).

In this Circuit, the rule has been established that the "position" of the government includes the agency action which made it necessary for the party to file the suit, and is not limited to the government position in the litigation phase. *Natural Resources Defense Council v. United States Environmental Protection Agency*, 702 F.2d 700, (3d Cir. Mar. 23, 1983). It appears to us in the present case that the government is relying entirely on its litigating position in opposing the payment of attorneys' fees.

But the holding of the Court of Appeals in this case, by which the plaintiff finally prevailed, was that the government is estopped because of the affirmative misconduct of its agent (698 F.2d 615) seems to us to establish conclusively that the government's pre-litigation position was not substantially justified, and we so find.